STATE OF MICHIGAN

COURT OF APPEALS

GAIL WROBBEL, Plaintiff-Appellant,	UNPUBLISHED January 28, 2014
v	No. 305535 Oakland Circuit Court
HYDAKER-WHEATLAKE CO., Defendant-Appellee.	LC No. 2009-101353-CD

GAIL WROBBEL, Plaintiff-Appellant/Cross-Appellee,	
v	No. 312766 Oakland Circuit Court
HYDAKER-WHEATLAKE CO., Defendant-Appellee/Cross-Appellant.	LC No. 2009-101353-CD

Before: SAAD, P. J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals both a jury verdict that rejected her gender discrimination claim, and the trial court's subsequent denial of her motion for a new trial. She also challenges the trial court's earlier grant of summary disposition to defendant on her claims of retaliation, conspiracy, and coercion of a third party to violate the Elliott Larsen Civil Rights Act (ELCRA). In a separate docket, plaintiff appeals the trial court's award of attorney's fees to defendant, which defendant also challenges on cross-appeal. For the reasons stated below, we affirm the holding of the trial court, but remand to the trial court for further explanation and reconsideration of the hourly rate deemed reasonable only for attorney Bardelli.

I. FACTS AND PROCEDURAL HISTORY

This lawsuit arises from defendant's decision not to hire plaintiff. Defendant is a corporation involved, through a contract with Detroit Edison, in the construction, repair and

maintenance of high-voltage electrical power lines and communication towers in Southeastern Michigan. In this capacity, defendant is a party to a multi-employer collective bargaining agreement (CBA) with the International Brotherhood of Electrical Workers (IBEW). Plaintiff is a member of Local 17 of the IBEW (Local 17), which covers the relevant work region.

Local 17 and various employers, such as defendant, use a referral system to place and hire electrical workers, which allows employers to select individual workers in a number of ways. Union members that are unemployed place their names in an "out-of-work" book, which is organized by job classifications and is maintained exclusively by Local 17. When contractors have open positions, they contact Local 17 to inform it of the job opening, the location and the necessary qualifications of the person to be referred. Local 17 reviews the out-of-work book and refers the first-listed individual to the contractor, so that it can fill the open position. The individual identified will be contacted by Local 17 and provided a referral slip to bring to the contractor. Contractors have an absolute right to refuse any individual referred for any or no reason. If the worker is accepted by the contractor, the worker's name is removed from the book and the individual is processed for employment by the contractor. If the contractor rejects the individual referred, the contractor signs the referral slip indicating rejection of the worker and the process continues using the next person listed in the out-of-work book. The rejected worker returns to his previous position in the out-of-work book until another referral opportunity arises.

The rank order method described above is not the only way a contractor may fill an open job, however—a contractor may also request a specific individual to fill a specific position. If a contractor does request a specific worker, it provides the individuals listed ahead of the requested worker in the out-of-work book with a signed rejection slip.[1]

In compliance with this procedure, defendant's general foreman, Thomas Kavanagh, contacted Local 17's assistant business manager, Timothy Head, on January 18, 2008, and told him defendant needed a material handler or yardman/operator for its Pontiac yard. Kavanagh told Head that he specifically wanted Gregory Coscione for the position and that he would reject anyone above Coscione in the out-of-work book. Head contacted Coscione regarding the job opportunity, and Coscione obtained the referral slip and was hired by defendant on January 22, 2008. Head also prepared and sent Kavanagh a rejection slip identifying each individual above Coscione in the out-of-work book and requested that he sign for each of the rejected individuals. At this time, plaintiff was listed first in the out-of-work book. Five or six male workers were also listed in the book after plaintiff and before Coscione. On January 23, 2008, Head contacted plaintiff by telephone to inform her of the opening with defendant, but advised her of defendant's refusal of everyone in the book except for Coscione. Despite this information, plaintiff obtained a referral slip for the position and was rejected when she appeared at defendant's designated site. Plaintiff remained in the first position in the out-of-work book after the rejection.

Plaintiff subsequently sued defendant in the Oakland Circuit Court, and alleged a plethora of claims, including: (1) gender discrimination and retaliation under the ELCRA; and

[1] As we will discuss later, plaintiff herself benefited from this procedure when another contractor hired her despite her lack of priority in the out-of-work book.

(2) conspiracy. The trial court summarily dismissed her assertions of retaliation and conspiracy, based on the lack of any evidence to support those assertions, but allowed the claim of gender discrimination to proceed to jury trial. The jury rejected plaintiff's claim, citing no cause of action, and the trial court ordered her to pay defendant's attorney's fees. It also denied her motions for a directed verdict, judgment notwithstanding the verdict (JNOV), and a new trial.

Plaintiff appeals all her earlier claims, and now disputes the award of attorney's fees. Defendant also cross-appeals on the attorney fee award, and contends that it is entitled to pre-judgment interest. We note at the outset that plaintiff's substantive claims lacked evidentiary support and were predicated largely on supposition and speculation. Yet plaintiff asserts many theories and claims of error, which we analyze in some detail below.

II. ANALYSIS

A. RETALIATION

"We review a trial court's decision on a motion for summary disposition de novo." *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher*, 300 Mich App at 139–140.]

The ELCRA provides that a person shall not "[r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.2701(a). To establish a prima facie retaliation claim under the ELCRA, a plaintiff is required to prove: "(1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001) (quotation marks and citation omitted). "To establish causation, the plaintiff must show that his participation in activity protected by the CRA was a significant factor in the employer's adverse employment action, not just that there was a causal link between

the two." *Id*. (quotation marks omitted). The parties do not dispute that plaintiff's earlier federal lawsuits[2] comprised engagement in a protected activity or that defendant's actions were adverse to plaintiff. The controversy centers on defendant's knowledge of plaintiff's involvement in a protected activity, and the existence of a causal connection between the protected activity and defendant's actions.

The premise of plaintiff's lawsuit is the supposed, but, on the record, unsubstantiated existence of pervasive gender discrimination in the electric service industry. She contends that her retaliation claim is supported by the alleged fact that the electric worker community is small and close-knit, and the purported prevalence of rumors and gossip within that community. Plaintiff's replies to questions on the factual underpinnings of her retaliation claim demonstrate the sweeping and unsupported nature of her allegations:

> *Q.* Is that what you believe? They refused to hire you just simply after the lawsuit or because of the lawsuit?
>
> *A.* I believe they didn't hire me because of the lawsuit and because I'm a female.
>
> *Q.* Okay. And as I understand it, we've already exhausted sort of your position on why you think it's because you were a female, and my question is, why do you believe – what makes you believe that the company, Hydaker, didn't hire you because you had filed a lawsuit?
>
> *A.* Because Greg [Coscione] and I were both capable of doing the same job, retaliation. Why would they not hire me?
>
> *Q.* Okay.
>
> *A.* And I'm sure – and I don't know how. It seems like everybody knows about this lawsuit.
>
> *Q.* Okay.
>
> *A.* That's why I think I was refused.
>
> *Q.* And in your view, is it just simply knowing about a lawsuit makes someone want to retaliate against the person who filed it?
>
> *A.* I believe so.
>
> *Q.* So, anybody anywhere in the union that ever refuses you for a job who knew about the lawsuit, it must be because of retaliation?

[2] See *Wrobbel v Int'l Brotherhood of Electrical Workers, Local 17*, 638 F Supp 2d 780 (ED Mich, 2009); *Wrobbel v Asplundh Constr Co*, 549 F Supp 2d 868 (ED Mich, 2008).

A. I believe they don't think women belong in this industry.

Q. Okay.

A. Having a lawsuit against any of these companies or the union, basically the union, does not help.

* * *

Q. Have you ever spoken with anybody not with Hydaker who has told you, "Yeah. I talked to those people at Hydaker, and they told me the reason they didn't hire her was because she filed a lawsuit"?

A. I don't remember if I have or not.

Q. So, you can't think of anybody who has ever told you that?

A. Correct.

Q. Is there anything other than the fact that you filed a lawsuit and you didn't get the job that causes you to believe that the fact that you didn't get the job was because you filed the lawsuit?

A. Now, I believe I didn't get the job because I am a female.

Q. Okay.

A. Number one. Because of the lawsuit, number two. There was no reason not to hire me.

Accordingly, by plaintiff's own admission, her retaliation claim against this single defendant is based on unsubstantiated allegation of industry-wide gender discrimination—not any specific knowledge of her actions that defendant actually possessed. Her contentions to the contrary are mere supposition and speculation. Defendant's agent, Kavanagh, testified that he was working in California when plaintiff's lawsuits were initiated. He denied any knowledge of the specifics of plaintiff's various lawsuits or the involvement of the electrical contractor Asplundh. He also indicated only hearing of the involvement of one female worker in the legal action—Bobbi Lynn; and that she had received some amount of money. And he stated that he had not discussed plaintiff's lawsuits with Head.

The only testimony that suggests defendant had knowledge of plaintiff's protected activity is Head's recollection that Local 17 revised its referral procedure in 2004. The new referral method required employers rejecting referred union members to sign rejection slips verifying that the union member had been referred. Head implied that the revised procedure arose, at least in part, as a response to the federal lawsuits. Head verified, in implementing the new procedure, "I talked to at least one individual with each company because since then they're adhering to my request that if they rejected a person over the phone, that they would sign their

name to it." But this interaction could not have directly involved Kavanagh because the procedure was implemented while Kavanagh was working out of state.

Even if defendant's knowledge of the protected activity could be imputed to Kavanagh, plaintiff has not established the necessary elements for a prima facie case of retaliation. "To establish causation [when bringing a retaliation claim under the ELCRA], the plaintiff must show that his participation in activity protected by the [EL]CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett*, 245 Mich App at 315. The record is devoid of any evidence, other than plaintiff's allegation, that her earlier federal lawsuits were a consideration, let alone a "significant factor," in Kavanagh's decision to hire Coscione over her. *Id.* Further, plaintiff's deposition belies her assertion that she was denied jobs based on her participation in a protected activity. When asked about her conspiracy claim, plaintiff stated:

> *Q.* Anything else that leads you to believe . . . it's a conspiracy?
>
> *A.* I don't believe they hire women.
>
> *Q.* "They"?
>
> *A.* Being any of the contractors. Just about any of the contractors any more. Until *after* this lawsuit, the women weren't getting jobs.
>
> *Q.* None of the contractors will hire women? Is that what you're telling me?
>
> *A.* [U]ntil *after* this lawsuit with Asplundh had started, none of the women had a job. [Emphasis added.]

Plaintiff reiterated this belief in response to further questioning, stating, "I'm just saying throughout the last couple years since this lawsuit has started with Asplundh, it's – the females have had a hard time getting a job. *Until* the Asplundh lawsuit . . . the females weren't working, to the best of my knowledge." (Emphasis added.)

As such, plaintiff failed to establish a prima facie case of retaliation, and the trial court properly granted summary disposition to defendant.

B. CONSPIRACY

The ELCRA prohibits two or more persons from conspiring to "aid, abet, incite, compel, or coerce a person to engage in a violation" of the act; or to "attempt directly or indirectly to commit an act prohibited" by the ELCRA. MCL 37.2701. As discussed in *Urbain v Beierling*, 301 Mich App 114, 131–132; 835 NW2d 455 (2013) (citations omitted):

> This Court has defined a civil conspiracy as "a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." In addition, to establish a concert-of-action claim, a plaintiff must prove "that all

> defendants acted tortiously pursuant to a common design" that caused harm to the plaintiff. For both civil conspiracy and concert of action, the plaintiff must establish some underlying tortious conduct.

Proof of a civil conspiracy may be established through circumstantial evidence and may be premised on inference. Specifically:

> The agreement, or preconceived plan, to do the unlawful act is the thing which must be proved. Direct proof of agreement is not required, however, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts and conduct of the parties establish an agreement in fact. Furthermore, conspiracy may be established by circumstantial evidence and may be based on inference. [*Temborius v Slatkin*, 157 Mich App 587, 600; 403 NW2d 821 (1986).]

The burden of proof is on the plaintiff to provide evidence from which a jury could reasonably infer the concurrence or agreement of two or more individuals to jointly engage in the unlawful purpose. *Rencsok v Rencsok*, 46 Mich App 250, 252; 207 NW2d 910 (1973).

Here, plaintiff unconvincingly contends defendant and Local 17 violated the ELCRA and conspired to prevent her hiring. As the trial court noted, her alleged proofs of conspiracy and incitement are nothing of the sort. Plaintiff was not precluded from entering her name in the out-of-work book or from obtaining a first position for referral in the book as jobs became available. Contrary to plaintiff's assertions, Head and Kavanagh testified that her name and position for referral were not discussed because Kavanagh immediately indicated he wished to hire Coscione, and intended to reject all individuals ahead of Coscione in the out-of-work book. Head indicated that despite Kavanagh's adamant insistence on Coscione, Head "told him there's a number of people in front of Greg Coscione. . . ." When plaintiff was informed of the position and her verbal rejection by Kavanagh, she still requested and received from Local 17 a referral slip to take to the employer.

Plaintiff nonetheless contends that the delay in her receipt of notice of the position suggests a conspiracy to preclude her from obtaining employment. There is no dispute that Kavanagh phoned Head on January 18, 2008, informing him of the open position and requesting Coscione. Coscione received his referral slip from Local 17 and took it to defendant on January 22, 2008. Plaintiff was not contacted regarding the referral until January 23, 2008. During this period, on January 22, 2008, Head sent a document by facsimile to Kavanagh requiring his specific rejection of plaintiff and the other individuals listed ahead of Coscione in the out-of-work book. Plaintiff implies that, had Local 17 informed her of the position and provided her with a referral slip on January 22, she would have been able to obtain the position with defendant.

There is no evidence to sustain this supposition. Both Kavanagh and Head testified that Kavanagh was adamant about hiring a specific individual: Coscione. Kavanagh rejected plaintiff and several male workers preceding Coscione in the out-of-work book. Contrary to plaintiff's argument that she would have had the opportunity on January 22 to obtain employment had she been provided a timely referral, Head emphasized that defendant was entitled to exercise its

undisputed right under § 3.03 of the CBA to reject any person for any reason—which it did on January 18, 2008:

> When I'm referring the applicant for employment on the phone, when they tell me on the phone that they are going to reject that person or they are rejecting, that's when they rejected. They've exercised 3.03 at that specific time on the phone.

The timing of plaintiff's receipt of the referral slip is thus irrelevant and any delay in the effectuation of the referral procedure cannot be construed as a means to engage in a conspiracy. The leap in logic and inference is simply too attenuated—and plaintiff provides no evidence to assuage that attenuation.

In fact, plaintiff's acknowledged in her deposition testimony that she had no proof to support her allegations of conspiracy:

> *Q.* If I understand you correctly, it's your belief that all of those contractors have a conspiracy with the union so that they will send you out on a bogus referral, knowing that you're not going to get a job, with the expectation that while you're gone, they're going to pull somebody else off the list below you and send them to a job that they're going to get hired for? Do I have that right?
>
> *A.* I believe that's part of it, yes.
>
> *Q.* Is there anything else that you think amounts to this conspiracy?
>
> *A.* Besides being female?
>
> *Q.* Besides being female.
>
> *A.* Not that I can – not that I can recall right now.
>
> *Q.* Now, in the case where you went out to Hydaker in January of 2008 . . . you went there knowing you were going to be refused; correct?
>
> *A.* Correct.
>
> *Q.* So, what leads you to believe that Hydaker conspired with the union to have you sent out there?
>
> *A.* I can't prove anything right now.
>
> * * *
>
> *Q.* Any reason to believe that Hydaker participated in a conspiracy as you've described it?

A. Yes, I do. Like I said, they hired a male that was supposedly below me on the books; didn't give me a chance; knew nothing of me, supposedly. Why would they refuse somebody that they didn't know of?

Q. And that's what causes you to believe there's a conspiracy?

A. For the most part.

In sum: plaintiff's theory of a conspiracy begins with the end result of someone else being hired for a position and works backward to assume that this result could only have occurred had defendant and Local 17 conspired to preclude her employment.[3] This claim is meritless and the trial court correctly granted summary disposition to defendant.[4]

C. DENIAL OF MOTION FOR DIRECTED VERDICT AND JNOV

> A trial court's decision on a motion for a directed verdict is reviewed de novo. The evidence presented up to the point of the motion and all legitimate inferences from the evidence must be viewed in the light most favorable to the nonmoving party to determine whether a fact question existed. It is for the jury to weigh the evidence and decide the credibility of the witnesses. A trial court properly grants a directed verdict only when no factual question exists upon which reasonable minds could differ. [*Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 697; 819 NW2d 28 (2011) (citations omitted).]

"When a litigant shows that a verdict is against the great weight of the evidence, the litigant establishes a proper basis for the trial court to grant a new trial rather than judgment

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[3] We note that plaintiff has a history of making unsubstantiated allegations of conspiracy. See *Wrobbel*, 638 F Supp 2d at 795:

> Plaintiff's testimony demonstrates that Plaintiff's allegations of a conspiracy between Local 17 and Asplundh are just that-allegations based upon her own subjective speculation. She has come forward with no evidentiary facts to support a finding that the Union and Asplundh acted in concert to discriminate against her. And, it is well-settled that subjective beliefs untethered to the evidence will not support a substantive discrimination claim. *Mitchell v Toledo Hosp*, 964 F 2d 577, 585 (CA 6, 1992) (a plaintiff's "conclusory allegations and subjective beliefs . . . are wholly insufficient evidence to establish a claim of discrimination as a matter of law."); *Adebisi v Univ of Tennessee*, 341 Fed Appx 111, 113 (CA 6, 2009).

[4] In addition, plaintiff's request to overturn the trial court's summary dismissal of her conspiracy claim fails due to its interaction with her primary claim: gender discrimination. Based on the jury's determination that gender discrimination—the "gravamen" of her complaint—did not occur, the "allegation of civil conspiracy, standing alone, is not actionable." *Cousineau v Ford Motor Co*, 140 Mich App 19, 37; 363 NW2d 721 (1985).

notwithstanding the verdict." *Kenkel v Stanley Works*, 256 Mich App 548, 561 n 10; 665 NW2d 490 (2003). A trial court's decision on a motion for JNOV is reviewed de novo, with the evidence and all legitimate inferences arising therefrom viewed in the light most favorable to the nonmoving party. *Sniecinski v Blue Cross Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). A trial court's grant of a motion for JNOV is appropriate only if the evidence viewed in this light fails to establish a claim as a matter of law. *Id*. A jury verdict must stand if reasonable jurors could have honestly reached different conclusions. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

"When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011) (quotation marks and citation omitted). "A directed verdict is appropriate where reasonable minds could not differ on a factual question." *Id*. In evaluating a motion for a directed verdict, this Court views the evidence adduced up to the time that the motion is brought. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). As our Court held in *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005) (citations and quotation marks omitted):

> When reviewing a trial court's decision on a motion for a directed verdict, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony. Similarly, the trial court should grant a JNOV motion only if, reviewing the evidence and all legitimate inferences in favor of the nonmoving party, the evidence fails to establish a claim as a matter of law. When the evidence presented could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury.

In *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001), the Michigan Supreme Court adopted the framework outlined in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973) to establish a prima face case of discrimination. Specifically, a plaintiff is required to demonstrate that "(1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." *Hazle*, 464 Mich at 463. "When the plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises." *Id.* (citations and quotation marks omitted). This is not, however, the conclusion of the inquiry.

> Thus, once a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case. The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel. If the employer makes such an articulation, the presumption created by the

McDonnell Douglas prima facie case drops away. [*Id.* at 464–465 (citations, quotation marks and footnotes omitted).]

Here, plaintiff claims that the trial court erred when it denied her motions for directed verdict, JNOV, and a new trial on her gender discrimination claim. There is no dispute that the first three elements required to establish a prima facie case of gender discrimination are present: it is implicitly acknowledged (a) that plaintiff is a member of a protected class, (b) that she suffered an adverse employment decision, and (c) that she was qualified for the position. *Hazle*, 464 Mich at 463.

The dispute in this case centers on plaintiff's ability to establish the final element that "the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." *Id.*[5] Plaintiff's evidence that such circumstances exist is that until she was listed as first for referral, defendant typically accepted Local 17's referral of the next person in line in the out-of-work book to fill an open position. She implies that defendant's alleged variance from its typical hiring procedure provides circumstantial evidence that permits an inference of discrimination. Further, plaintiff notes that Kavanagh acknowledged that the profession is "male dominant" and that he has typically not worked with women in the various positions he has held with different electrical contractors.

This evidence is extremely weak, and plaintiff ignores other evidence and testimony that flatly contradicts her allegations of sex discrimination. In addition to plaintiff, defendant also rejected several men ahead of Coscione in the out-of-work book, which substantially undermines plaintiff's contention that Coscione's selection was a means to preclude her employment. Kavanagh and Head also testified that Kavanagh did not procure the names of the individuals he rejected until he had already indicated he wanted to hire Coscione. Again, there is no evidence that defendant knew the identity or gender of the individuals it rejected at the crucial time of the decision. Plaintiff's identity and gender became known when Local 17 provided defendant with a list requiring a signature to verify rejection of the other individuals—long after the relevant opportunity for any possible discrimination. The rejection, according to Head, occurred on the telephone and not, as argued by plaintiff, when she presented herself at defendant's yard with a referral slip. And while defendant's method of hiring in this instance did not follow the typical format it had exercised in the past, it was not contrary to the practice of contractors and was deemed acceptable by Local 17 under the CBA. Indeed, the fact that plaintiff herself benefited from this same procedure—on a previous occasion, another contractor hired plaintiff despite her lack of priority in the out-of-work book—renders her reliance on this point very dubious.

Further undermining plaintiff's assertion of discrimination is evidence that she was offered referrals to defendant for other positions, but refused them based on their location or the

[5] Plaintiff repeatedly cites the fact that defendant hired a man instead of her, and seems to imply that this end result in and of itself is evidence of discrimination. This suggestion is a complete misstatement of the law—the "*process* by which [the decision] was reached" is the focus of our discrimination inquiry, not the "*outcome* of an action." See *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302, 315; 553 NW2d 377 (1996) (emphasis original).

alleged lack of availability of reliable transportation. It is disingenuous of plaintiff to profess her desire to do a certain job, and then refuse that same job when it is in a different location.

The trial court did not err in denying plaintiff's motions for a directed verdict or for a JNOV. Based on the evidence admitted and viewing all legitimate inferences from the evidence in favor of defendant, a reasonable jury could conclude that defendant did not discriminate against plaintiff based on her gender.[6]

D. DENIAL OF MOTION FOR NEW TRIAL[7]

Plaintiff asserts that she is entitled to a new trial because of: (1) defense counsel's alleged misconduct; and (2) the trial court's alleged error in making a specific jury instruction. We address each issue in turn.

1. DEFENSE COUNSEL'S ALLEGED MISCONDUCT

Plaintiff asserts that defense counsel's supposed reference to her prior lawsuits constituted misconduct that necessitates a new trial. During cross-examination, defense counsel asked plaintiff about her claim for emotional damages:

> And you've alleged in some papers that have been filed in the court that Local 17 caused you, I don't know, let's see, mental anguish, emotional distress, loss of ordinary pleasure of life. You've said that about Local 17, too, haven't you?

Plaintiff objected to this line of inquiry, insisting that it violated the trial court's ruling on her motion in limine, which precluded any mention of her prior lawsuits or claims. The trial court ordered:

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[6] As noted, if a plaintiff is unable to demonstrate a prima facie case of discrimination under the *McDonnell Douglas* burden shifting framework, his ELCRA claim fails. *Hazle*, 464 Mich at 463. Here, plaintiff was unable to show a prima facie case. Her subsequent allegations that defendant had no legitimate or nondiscriminatory reason to select Coscione instead of her conflate different portions of the *McDonnell Douglas* framework. *Id*. at 464–465. Issues of pretext—which plaintiff purports to raise—only arise *after* plaintiff has demonstrated a prima facie case. *Id*. As plaintiff has failed to do so here, her protestations for a new trial on this matter are without merit.

[7] A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000). "When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses." *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006).

> [T]hat counsel shall not elicit testimony or introduce any other evidence of Plaintiff filing litigation other than the present litigation, including references of making claims or filing charges.

But a review of the exchange in context indicates defense counsel sought to clarify plaintiff's damages, and to quantify the damages she attributed to the circumstances *from this case*. Plaintiff acknowledged during unchallenged questioning that a substantial percentage of her emotional distress was attributable to matters unrelated to defendant. The question plaintiff challenged involved a further attempt by defendant to differentiate damages attributed by plaintiff to the actions of Local 17, which was also a party at an earlier point in this lawsuit, from damages attributed by plaintiff to the actions of defendant. The trial court's order on plaintiff's motion in limine did not proscribe defendant's ability to question plaintiff on her *current* lawsuit, and defense counsel's doing so cannot constitute misconduct.

In any event, defense counsel conceded to the provision of a curative instruction regarding the questioning—which plaintiff rejected. The trial court reasoned that such an instruction was unnecessary based on the "brief" and "isolated" nature of the exchange—and plaintiff agreed, to avoid focusing the jury's attention on the exchange. "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Plaintiff acquiesced to the trial court's determination that it would be more harmful than helpful to provide a curative instruction for one question and response elicited in four days of trial. Therefore, any suggestion on appeal by plaintiff that the trial court erred in responding to the alleged misconduct should be construed as waived because of plaintiff's apparent satisfaction with the trial court's response to her objection at the time of trial. See *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

2. JURY INSTRUCTIONS

Plaintiff complains that the trial court erred in a response it gave to the jury, after the onset of deliberations, on an agreement between her and another electric contractor (Harlan Electric). Specifically, the trial court instructed the jury "to rely upon your respective recollections" in an attempt to avoid giving an instruction that did not comport with evidence actually admitted during trial. Plaintiff responded by indicating that the trial court should provide the jury with a "statement that [the jury] not . . . concern [itself] with matters that go beyond what was presented to them in court."

Claims of instructional error are reviewed in accordance with the following standards:

> We review de novo properly preserved instructional errors, *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), and consider the jury instructions as a whole to determine whether they adequately present the theories of the parties and the applicable law. *Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 423; 493 NW2d 447 (1992). . . . "[A] verdict should not be set aside unless failure to do so would be inconsistent with substantial justice. Reversal is not warranted when an instructional error does not affect the outcome of the trial." *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d

1 (2008). [*Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 626-627; 792 NW2d 344 (2010).]

A trial court's decision pertaining to the provision of a special jury instruction or a supplemental jury instruction is reviewed for an abuse of discretion. *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008); *Chastain v Gen Motors Corp*, 254 Mich App 576, 590; 657 NW2d 804 (2002).

Plaintiff's claim here is particularly spurious, as she caused the alleged jury confusion of which she complains. Plaintiff responded to a question from her own counsel that she had signed an agreement not to seek employment with Harlan Electric. She then asserted she was not precluded from being considered or offered employment by this same contractor. A party is precluded from claiming error to which she contributed by either plan or negligence. *Lewis*, 258 Mich App at 210.

In addition, this alleged error went only to a factual issue involving plaintiff's damages. Because the jury ultimately determined that plaintiff failed to state a cause of action, any error attributable to a determination of damages is necessarily harmless. See *Beadle v Allis*, 165 Mich App 516, 525; 418 NW2d 906 (1987); *Cornforth v Borman's, Inc*, 148 Mich App 469, 478; 385 NW2d 645 (1986).

E. ATTORNEY'S FEES

Plaintiff contends the trial court erred in its determination of a reasonable hourly fee rate for defendant's counsel. Specifically, plaintiff challenges the hourly fee rate award of $350 to Edward Bardelli, and a rate of $332.50 to $342.50 for the years 2010 and 2011 to lead trial counsel, Andrea Bernard. While defendant does not find fault with the trial court's determination of the hourly fee rate, on cross-appeal it contends that the trial court erred when it reduced the number of hours billed and ordered an additional 15 percent reduction in fees.

1. APPLICABLE LAW

This Court reviews de novo a trial court's decision whether to grant case evaluation sanctions as a question of law, while the award of attorney fees and costs is reviewed for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). A trial court's decision whether to admit evidence is also reviewed for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). A trial court's findings of fact are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).[8]

[8] Defendant sought costs and attorney fees pursuant to MCR 2.625 and MCR 2.403. Plaintiff objected to the verified bill of costs submitted in conjunction with defendant's motion citing errors in the billing, and the excessive and repetitive nature of numerous charges contained within the document. Bernard acknowledged errors in the original verified bill of costs and submitted an amended summary and verification of time records, seeking $232,929 in fees from the date of the case evaluation.

Here, defendant sought reimbursement[9] of costs and fees in accordance with MCR 2.403, which states in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
>
> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> * * *
>
> (3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to its assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.
>
> * * *
>
> (6) For the purpose of this rule, actual costs are
>
> (a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.
>
> For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party. [MCR 2.403.]

Our court has explained that MCR 2.403(O) is "trial oriented," and that

[9] Defendant also sought reimbursement under MCR 2.625(A)(1), which provides: "Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action."

> "under MCR 2.403(O), a rejecting plaintiff who is liable for a defendant's attorney fees is only liable for those fees that accrued after the case evaluation as a consequence of defending against the rejecting plaintiff's theories of liability and damage claims." A potential award is limited because the rejecting party is "only [ ] liable for those attorney fees directly flowing from [his or] her rejection of the case evaluation—those that accrued after the rejection and which were caused by defendant having to defend against plaintiff's theory of liability and damage claim." Specifically, "a causal nexus [must] be established between the services performed by the attorney and the particular party's rejection of the case evaluation." [*Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 212–213; 823 NW2d 843 (2012) (citations omitted).]

When a court awards attorney fees as sanctions, it "follows the strictures and guidelines provided by our Supreme Court in *Smith* [*v Khouri*]." *Id*. at 227. *Smith* emphasized that the procedure for determining attorney fees is a multifaceted process, which incorporates factors listed in MRPC 1.5(a)[10] and *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982).[11] The *Smith* court clarified the order in which a trial court is to apply these factors:

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[10] The MRPC 1.5(a) factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

See also *Smith*, 481 Mich at 529–530, which noted that these factors overlap with the *Wood* factors.

[11] The *Wood* factors are: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional

> [A] trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [*Smith*, 481 Mich at 530–31 (footnote omitted).]

2. THE TRIAL COURT'S DETERMINATION OF ATTORNEY FEES

The trial court followed this framework in its analysis of the attorney fees dispute, and held a three-day evidentiary hearing that included testimony on: the setting and determination of hourly fee rates, a detailed review of the hours claimed, and a comparison of fees in the community through use of the State Bar Survey and outside testimony. The court summarized its findings in a thorough 21-page opinion and order, in which it acknowledged the status of the litigation after the completion of the case evaluation, identified the applicable court rules supporting a fee and cost award—specifically noting the "mandatory" nature of MCR 2.403—and verified defendant's status as the "prevailing party." And the court also specifically acknowledged the factors to be considered in the award of an attorney fee in accordance with MRPC 1.5a and as discussed in *Smith.*

The trial court thus made a thorough and careful determination of attorney fees that complied with *Smith*. When it precluded many of the hours billed, the trial court explicitly found that the work was redundant, excessive, duplicative, or performed by individuals who were overqualified for administrative functions.[12]

As the trial court implied, it is difficult to reconcile defendant's assertion of the skill and expertise alleged to be necessary to win this suit with the enormous amount of time expended on routine tasks that involved a trial comprising one issue and limited witnesses. One would

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relationship with the client." See *Van Elslander*, 297 Mich App at 228; and *Smith*, 481 Mich at 529.

[12] As our Court noted in *Van Elslander*:

> In the determination of "hours reasonably expended" the [*Smith*] Court cautioned that "'excessive, redundant or otherwise unnecessary' hours regardless of the attorneys' skill, reputation or experience" should be excluded. The *Smith* Court also emphasized "that the goal of awarding attorney fees under MCR 2.403 is to reimburse a prevailing party for its 'reasonable' attorney fee; it is not intended to 'replicate exactly the fee an attorney could earn through a private fee arrangement with his client.'" [*Van Elslander*, 297 Mich App at 231 (citations omitted).]

assume that attorneys of greater skill and experience would function and perform certain tasks more expeditiously or efficiently. Defense counsel's contention that the trial court ignored the result in its determination of attorney fees—which helped defendant avoid potentially millions of dollars in damages—is inapposite. Because plaintiffs may seek substantial damages in cases that ultimately are found to lack merit, the amount of damages claimed by a plaintiff is not determinative or a factor that requires specific weight in the analysis of entitlement to reasonable attorney fees. Rather, the pertinent question is the difficulty of the case as litigated and whether the final outcome was sufficiently favorable to defendant to justify an award of fees and costs. These factors were addressed in detail by the trial court and complied with *Smith*'s statement that fee awards "[are] not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls." *Smith*, 481 Mich at 528.

The only error in the trial court's analysis that requires remand is its failure to explain how it determined the reasonability of Bardelli's $350 an hour fee. The trial court specifically acknowledged that it heard no evidence at the hearing regarding Bardelli's experience or skill, or the reasonableness of the amount of time he expended on the evidentiary hearing. As the trial court recognized, the Bar Survey indicates a $282 hourly fee rate for equity partners, yet Bardelli received $68 per hour in excess of this rate, which makes little sense, as he only represented defendant at an evidentiary hearing, which does not require the rigor or expertise of representation at a jury trial. Further, his fee award is larger than that of the lead attorney in this litigation.

We therefore affirm the trial court's determination on the award of fees and costs, except with regard to Bardelli. The fee rate for Bardelli is remanded to the trial court for explanation of the basis of the award of fees only for this attorney.

F. DEFENDANT'S CLAIM FOR PREJUDGMENT INTEREST

On cross-appeal, defendant claims the trial court erred when it denied defendant an award of prejudgment interest pursuant to MCL 600.6013, which provides in relevant part:

> (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. . . .
>
> * * *
>
> (8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. In an action for medical malpractice, interest under

> this subsection on costs or attorney fees awarded under a statute or court rule is not calculated for any period before the entry of the judgment. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

"A trial court's interpretation of the prejudgment interest statute is a question of law, which this Court reviews de novo." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 319; 602 NW2d 633 (1999).

"The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature." *In re Townsend Conservatorship*, 293 Mich App 182, 187; 809 NW2d 424 (2011). If the statutory language is unambiguous, this Court will enforce the statute as written. *Id*. Statutes are to be read as a whole and courts are to avoid a construction that renders any part of the statute surplusage or nugatory. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012). "Individual words and phrases, while important, should be read in the context of the entire legislative scheme." *Id.* As our Court has previously noted:

> The prejudgment interest statute authorizes a party to collect interest on a money judgment recovered in a civil action, with the interest calculated from the date of filing the complaint "on the entire amount of the money judgment, including attorney fees and other costs." MCL 600.6013(6); MSA 27A.6013(6). In *Phinney v Perlmutter*, 222 Mich App 513, 540-541; 564 NW2d 532 (1997), we stated that the purpose of prejudgment interest is to compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages. In addition, the prejudgment interest statute is a remedial statute to be construed liberally in favor of the plaintiff. *McKelvie* [*v Auto Club Ins Ass'n*, 203 Mich App 331,] 339; 512 NW2d 74 [(1994)]. [*Attard*, 237 Mich App at 319.]

As such, prejudgment interest can be awarded in cases that involve a "money judgment," which has been defined by this Court, using Black's Law Dictionary, as "one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred." *Moore v Carney*, 84 Mich App 399, 404; 269 NW2d 614 (1978).

Construing the definition of a money judgment in the context of the statutory language, it is apparent that defendant is not entitled to prejudgment interest because it did not obtain a money judgment. Rather, defendant received a judgment of no cause of action, which is effectively a dismissal of the case and thus "an order directing an act to be done," and not the "payment of a sum of money." *Id*.[13] The trial court thus correctly denied defendant an award of prejudgment interest.

[13] Defendant also elects to ignore the full citation regarding its assertion of entitlement to an award as a prevailing party. "[T]he purpose of prejudgment interest is to compensate the *prevailing party* for *expenses incurred in bringing actions for money damages* and for any delay

III. CONCLUSION

Accordingly, we affirm the trial court's dismissal of plaintiff's claims of retaliation, conspiracy and incitement, and affirm the trial court's denial of plaintiff's motions for directed verdict, JNOV and new trial. Further, we affirm the determination and grant of reasonable attorney fees, hours and costs to defendant for Bernard and associate/junior attorneys, but remand for further explanation and reconsideration of the hourly rate deemed reasonable only for attorney Bardelli. And, we affirm the denial of defendant's request for prejudgment interest. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

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in receiving such damages." *Attard*, 237 Mich App at 319 (citation omitted, emphasis added). In the circumstances of this case, while defendant is clearly the prevailing party, it did not incur expenses "in bringing an action[] for money damages." Rather, defendant incurred an expense for defending against an action for money damages.